No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LaROQUE, J. ALSTON ADAMS; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION; FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN H. FAHEY, A. V. AMMANN, and GEORGE K. BRAMLEY,

Appellants,

vs.

MALLONEE, BUCKLIN, and FERGUS, *i. e.,* the SHAREHOLDERS' PROTECTIVE COMMITTEE of LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.,*

Appellees.

PETITION FOR REHEARING

BY APPELLEE, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

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Introduction.

The Appellee, Long Beach Federal Savings and Loan Association, respectfully petitions this Honorable Court for a rehearing, either in bank or before this same panel, of the appeal in the above-entitled cause, and in support of this petition represents to the Court as follows:

We reserve our argued position set forth specifically in our previous briefs, but in this Petition address ourselves soley to those features of the decision wherein we believe

the Court may be convinced its result is based upon the application of incorrect legal principles.

THEREFORE, this Petition is devoted to convincing this Court that it has erred in its determination as follows:

Rehearing and reconsideration by this Honorable Court of Appeals (either in bank or before the same panel) is respectfully urged by the Petitioner because, while the 100-page opinion (with footnotes) orders only that the order of preliminary injunction restraining the holding of an administrative hearing be reversed, the opinion discusses many fundamental jurisdictional questions, which are not necessary to the decision.

These holdings, if not modified by rehearing, go far beyond the scope of issues reviewable on this appeal. Such holdings are contrary to final judgments of the court below (from which no appeal was ever taken) and which are not now subject to review or reversal four or more years after entry of such judgments. The opinion appears to:

A. DISMISS PLEADINGS PASSED UPON BY SUPREME COURT:

Review, and order dismissed, pleadings unsuccessfully attacked in the U. S. Supreme Court in 1946, 1947 and in this Court of Appeals in 1947, 1948 and 1950.

B. NULLIFY THE INTERPLEADER STATUTE:

Vacate Interpleader relief granted four or more years ago by final judgments of the Court.

C. Vacate Final Judgments Four and Five Years Old:

Final judgments are swept aside by attacks upon original pleadings long since superseded by amendments, which amendments are now more than five years old and were unsuccessfully attacked in later appeals.

D. Deny Amendments in Furtherance of Justice:

The power of a trial court to permit amendments in furtherance of justice is held lost because of "sixteen months' delay". (This delay was caused solely by previous appeals to the U. S. Supreme Court in 1946 and 1947; the Supreme Court refused to dismiss the pleadings thus attacked.)

E. Expand "Exhaustion of Administrative Remedies":

The doctrine of Exhaustion of Administrative Remedies is expanded to preclude access to the Courts by parties to whom administrative hearings were never available, or were expressly denied by the Administrative Board. The doctrine of Exhaustion of Administrative Remedies is so expanded as to prevent any recourse to the Courts by thousands of homeowners wholly unconcerned with the administrative process and whose right to clear the titles to their homes is denied solely because of acts of others over whom the homeowners have no control.

F. PREVENT STAY POWER:

The opinion denies the traditional, as well as the statutory, power of a reviewing court, by either stay or injunction, to prevent merger pending administrative hearing or to, in any way, make orders to preserve the *status quo* prior to final termination of the administrative process to be reviewed.

G. DENY INTERPLEADER POWER TO PREVENT MULTIPLICITY OF ACTIONS:

In reversing the injunction against the administrative hearing, the opinion appears also to reverse the traditional interpleader injunction against litigation in any other courts. Parties would thus be required to withdraw their claims against the assets interplead for more than four years in the court below and to re-litigate in thousands of separate actions, and this without comment on the power of the court in interpleader.

H. LEAVE ACCOUNTING UNDECIDED:

The doctrine of Exhaustion of Administrative Remedies, if so expanded, would prevent enforcement of any order for accounting made by the administrative agency itself, prayed for in all pleadings (both original and amended), by the Shareholders' Protective Committee and by the Association, and which was ordered by a judgment of the District Court, now final for more than four years.

Exhaustion of Administrative Remedies is said to be a prerequisite to obtaining accounting for $26,000,000.00 in cash, Government Bonds, and negotiable securities, seized without notice and for which receipts were summarily refused.

All these disastrous consequences are caused without discussion or consideration of:

(1) Finality of the judgments clearing the titles to the homes of 8,000 borrowers.

(2) The right of the Shareholders' Protective Committee to judicial decision of their objections to the removed Conservator's accounting, as ordered by final judgment of the court below, and by final administrative order No. 388, neither of which has been reversed or modified. (The time for appeal from that final judgment expired more than four years ago.)

(3) The right of 16,000 Shareholders to obtain Declaratory Relief against the Federal Savings and Loan Insurance Corporation, to determine whether or not their $22,000,000.00 in savings are insured and if so, the amounts, terms and condition of such insurance.

More detailed consideration of the opinion and the particulars in which Counsel believe it in error, follow.

I.

DISMISSAL WILL RE-TANGLE TITLES.

Dismissal of the Mallonee-Association actions, if ordered by the Court of Appeals, will hopelessly re-tangle the titles cleared by the final judgments of the court below. Such dismissal cannot be final or conclusive against the rights of all parties to bring further actions.

Under California law, dismissal by a federal court upon the grounds stated in the Court of Appeals' opinion, is not conclusive of the merits and is not *res judicata* as between the parties. California cases so holding are:

> *Pickering Lumber v. Whiteside,* 54 Cal. App. 2d 200, 128 P. 2d 899, District Court of Appeal, Calif., 1942. Hearing denied California Supreme Court. Cert. Den. U. S. Supreme Court, 1943, 318 U. S. 763, 87 L. Ed. 1135.

The U. S. District Court in Missouri, in bankruptcy reorganization proceedings, dismissed intervention petitions of parties claiming ownership to land in California. After such dismissal, the U. S. Court ordered delivery of a deed to California land by one of the parties to the Clerk of the U. S. District Court, and ordered the Clerk of the U. S. Court to deliver the deed to another party. Both the party giving the deed and receiving the deed were still parties to the U. S. Court action and not affected by the dismissal of the interventions. The deed, when delivered by the clerk of the district court to the prevailing party, was immediately recorded in California, where the land affected was situated, and an action brought in the California State Court to quiet title.

The California Court action resulted in judgment for the defendants, and the title thus conveyed by deed from the Clerk of the U. S. Court was defeated because of the dismissal of the intervention petitions by the U. S. Court.

The California Court of Appeals said, at page 905 of P. 2d, and at page 211 of Cal. App. 2d, as follows:

> ". . . It is perhaps true that the bankruptcy court might have ~~been~~ then tried, determined and adjudicated the issues between the bank and the Whiteside executors, as to the right to the delivery of the deed. If it can fairly be said it did this, the judgment of the bankruptcy court is *res adjudicata,* and although perhaps erroneous, is a bar to defendants in this action; but if, as appears to be the case, the petition was dismissed without prejudice, nothing was adjudicated thereby as against intervenors. (Citing authorities.) . . . and they have no right to appeal and are not barred thereby. (Citing Authorities.) . . .
>
> ". . . But when, as was the case, the intervener's petition was dismissed 'without prejudice,' interveners were no longer before the court. They were not parties . . . AND THE COURT HAD NO POWER TO TAKE TITLE TO THEIR LAND AWAY FROM THEM."
>
> (Emphasis added.)

In our *Mallonee-Fahey* case, hundreds of reconveyance deeds were deposited with the clerk of the Court below, and by order of that court delivered by the clerk to the homeowners UPON INTERVENERS' PETITIONS. Dismissal of these interveners' petitions (such as Home Investment Company) will recloud the titles thus cleared by the Court below.

Dismissal for failure "to state a claim upon which *any* relief could be granted by a federal court" (p. 46, Court

of Appeals' Opinion in No. 12511) even if done *with* prejudice is not a final decision and would only result in thousands of new actions to quiet title. The California Supreme Court so held in:

> *Goddard v. Security Title Insurance Co.,* 14 Cal. 2d 47, 92 P. 2d 804, Sup. Ct. of Calif., 1939.

Action by beneficiary against trustee and its stockholders for loss of real property conveyed to trustee as part of trust estate.

Defendants pleaded, as *res judicata,* a former final judgment of this Court of Appeals, Ninth Circuit, dismissing a complaint in Federal Court proceedings involving the same matters.

The California Supreme Court held the Federal Court proceedings, although "dismissed with prejudice," were not conclusive on the rights of the parties, regardless of the intention of the U. S. Court.

The California Supreme Court said at page 807 of P. 2d, and at page 53 of Cal. 2d:

> ". . . The court's determination amounted to nothing more than that the plaintiff had failed, in the two respects mentioned above, to establish a right of recovery against the defendant by that particular complaint. THE JUDGMENT WAS BASED UPON FORMAL MATTERS OF PLEADING, AND CONCLUDED NOTHING save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and under the rules set forth above, is not *res judicata.*" (Emphasis added.)

CONSTRUC

958

DESTROY THIS NOTE: When paid, this note, with Deed of Trust securing same, must be surrende
for cancellation, before reconveyance will be made.

Note Secured by Deed of Trust

.00 ..... Long Beach ....., California, ... May 28th ....., 1

ue received I promise to pay to Long Beach Federal Savings and Loan
iation, a Federal corporation ....., or
office of Long Beach Federal Savings and Loan Association
ncipal sum of Forty-five Hundred and no/100 ($4500.00) - - - DOLL
terest from date hereof ....., 19....., on unpaid principal
6 per cent per annum, interest payable monthly on the 1st day of each
period from May 28th ....., 1945, to August 1st ....., 19
tes inclusive: commencing September 1, 1945, principal and interest payable in mo
ents of Forty-five and no/100 ($45.00) DOLLARS each, on the 1st day o
and continuing until said principal and interest have been paid in full.

payment shall be credited first on interest then due and the remainder on principal; and interest shall
se upon the principal so credited. Should default be made in payment of any installment when due, or
nce of any agreement in the deed of trust securing the payment of this note, the whole sum of princip
shall become immediately due at the option of the holder of this note and shall, at the option of such
rest during the period of such default at the rate of 8 per cent per annum. Principal and interest pay
oney of the United States. If action be instituted on this note, I promise to pay such sum as the Cou
torney's fees. The holder hereof agrees to accept additional payments, provided however, that should th
qual or exceed 20 per cent of the original principal amount of the loan, 30 days unearned interest on the
d may be charged as a bonus.

note is secured by DEED OF TRUST to TITLE SERVICE COMPANY, A California corpor

..... William Shaub .....

..... Evelyn A. Shaub .....

.....

Sample of notes aggregating $12,000,000.00 secured by trust deeds
homes of 8,000 borrowers. Conflicting claims caused by seizure
d assignment of these notes clouded and tangled titles to borrowers'
mes. (See page 9.)

PLATE 2

PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO
LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION

BY _____

CONSERVATOR

Sample of endorsements by conservator of $12,000,000.00 of notes and trust deeds on homes of 8,000 borrowers. All endorsements were undated. (See page 9.)

The Federal Court judgment referred to is reported in 82 F. 2d 902. Justice Wilbur's opinion schedules the real properties involved, and Justice Denman's dissent predicts the final outcome of relitigation in the state courts more than three years after the Ninth Circuit Court of Appeals' opinion.

Other California cases to the same effect are:

Olds v. Peebler, 151 P. 2d 901, 66 Cal. App. 2d 76, Dist. Ct. of App., 1944.

Campanella v. Campanella, 269 Pac. 433, 204 Cal. 515, Sup. Ct. of Calif., 1928.

Dismissal of *Mallonee v. Fahey* is not required in order to permit the administrative hearing and judicial review to follow.

The titles of the 8,000 homeowners were tangled past the power of any administrative hearing to clear when Conservator Ammann, IN JUNE OF 1946, assigned $10,000,000.00 of seized notes and deeds of trust to San Francisco Bank. A specimen of the thousands of such endorsements is shown on plate No. 2 hereof.

The administrative hearing, set for JULY 3, 1946 at Los Angeles, was "too little and too late." After such assignments only a court could clear the homeowners' titles of the conflicting claims of the San Francisco and Los Angeles Banks as well as those of the conservator and the Shareholders' Protective Committee.

Removal of the conservator by administrative order did not end his claims to act as conservator, nor his liability for so acting, and this regardless of the validity, or invalidity, of his appointment.

In July, 1949, ONE YEAR AND FIVE MONTHS AFTER the conservator had been removed, both by Order No. 388 of the appellants Home Loan Bank Board and by final judgment of the court below, appellants yet maintained that the conservator was still acting but was merely "wrongfully ousted" from control of the Association.

[R. 7030-7031, Answer of Federal Savings and Loan Insurance Corporation, July 18, 1949]:

> ". . . This defendant further states that said A. V. Ammann has continued to be and *is now* the proper and duly designated Conservator for said association but that since said January 24, 1948, said A. V. Ammann has been prevented from performing and exercising the duties of Conservator by reason of an Order of this Court entered on January 23, 1948, . . . " (Emphasis added.)

No administrative hearing could result in anything more final than Order No. 388 (dated January 17, 1948), which read in part:

> ". . . the . . . Order . . . appointing a Conservator for the Long Beach Federal Savings and Loan Association . . . is hereby rescinded, . . ."

No administrative hearing reviewed by a court could result in anything more final than the judgment of January 23, 1948, of the Court Below, which read in part [R. 8321, Appeal No. 12511]:

> "It Is Further Ordered that possession, management, control, custody and operation, and all evi-

> dences of title and/or ownership of all property, . . . real, personal, or mixed, . . . shall be transferred and moved from and by said defendant, A. V. Ammann, as such conservator . . . and shall pass and be delivered to the Long Beach Federal Savings and Loan Association. . . ."

The administrative process had been "exhausted" in a final administrative Order No. 388, removing the conservator and ordering him to account. Judicial review had proceeded to the point of judgment enforced by the removal of the conservator. No appeal was taken and the judgment was final. (Appellants' Opening Brief, Appeal No. 12511, pp. 34-35.) The accounting was yet pending. A year and a half had passed. Yet, appellants assert to the court:

> ". . . said A. V. Ammann has continued to be and is now the proper and duly designated Conservator . . ."

The next step in this assertion would be for Ammann to reoccupy the Association's premises, reseize its assets, and pay off the $7,000,000.00 disputed debt to the San Francisco Bank against the will of the Long Beach shareholders and without adjudication of the debt.

With special permission of the Court of Appeals, the San Francisco Bank, in March, 1952, filed in the California State Courts, its complaint to foreclose $7,000,00.00. The complaint asked, on page 12, line 11:

> "For judgment foreclosing its aforesaid lien in the manner as provided by law."

On page 7, lines 11 to 21, it alleges in part:

> "That said defendant assigned, delivered and pledged to plaintiff . . . promissory notes secured by mortgages or deeds of trust on real property . . . as security for the repayment of said sums advanced and loaned to said defendant by said plaintiff . . . That by reason of said assignments and pledges said plaintiff became, ever since has been AND STILL IS the owner and holder of a lien upon all said pledged and assigned property." (Emphasis added.)

In January of 1948, *after* final administrative Order No. 388, the Court removed Ammann and quieted title against him. In March of 1948, *after* final administrative Order No. 388, the Court quieted title against the San Francisco Bank as to the notes and deeds of trust. No appeal was ever taken from either of such final orders.

The District Court found in making the order quieting title against the San Francisco Bank, in part, as follows [R. 8410-8411]:

> ". . . That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of

trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans."

and ordered [R. 8533-8534]:

"The lien and obligation and charge of the claims of the Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of Los Angeles (or either or both, or the total combined amount of said claims) and either or both of the same are hereby lifted and removed from the said notes and deeds of trust and each and all of them and are transferred to, and restricted to, and shall be claims to, and obligations upon, the said sum of $5,300,000.00 in bonds herein ordered deposited in Court and such additional sum in money from the sum in excess of $1,500,000.00 already in the Registry of this Court, sufficient to make the combined total sum of $6,324,098.35 with interest on $6,300,000.00 at 2% per annum from March 10, 1948, until paid

. . .

". . .

"It is further ordered that any and all endorsements appearing on each or any of the notes and trust deeds hereinafter described in favor of said Federal Home Loan Banks of San Francisco and any and/or all instruments assigning or transferring or purporting to assign or transfer said notes and/or trust deeds are hereby cancelled, and the title thereto and to each and every of such trust deeds and notes, if any title passed from said Long Beach Federal Savings and Loan Association, is hereby revested in said Long Beach Federal Savings and Loan Association."

Thereby the thousands of endorsements (a specimen of which is Plate No. 2), were cancelled by final order of the Court below (final for four years from lack of appeal therefrom). Dismissal if now ordered by the Court of Appeals will result in, not hundreds, but actually thousands of separate quiet title actions by each individual homeowner to lift from the title to his home the tangle, removed four, or more, years ago by the District Court.

The need to ". . . order the case retained on the district court docket pending the Board's action"[1] is imperative to save the homeowners, the shareholders, and the Association, from another seizure, with further runs, tangled titles, and complete destruction of the Association.

---

[1]*Far East Conference v. United States* (U. S. Sup. Ct., March, 1952), 96 Adv. L. Ed. No. 10, p. 390; *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949).

II.

ADMINISTRATIVE HEARING REFUSED BY APPELLANTS THOUGH DEMANDED BY ASSOCIATION'S SHAREHOLDERS.

The opinion of the Court of Appeals reverses because of "failure to exhaust administrative remedies." Apparently the court is not aware that from January 23, 1948 until September 9, 1949, a period of twenty months, appellants Home Loan Bank Board *refused* to permit any administrative hearing. Such refusal was disclosed by testimony and exhibits before the second Congressional Investigation Hearings (subsequent to the printing of the record on this appeal). Certified copies thereof, attested to by the Clerk of the Congressional Investigating Committee, are filed herewith. Reference is made to them for full particulars.

On January 20, 1948, a telegram was sent to the Home Loan Bank Board Chairman by an attorney for certain of the shareholders of the Long Beach Association. It read:

"NITE LETTER TO:

January 20 [1948]

"SAMUEL DIVERS,
Chairman, Federal Home Loan Bank Board
Washington, D. C.

"On behalf of minority shareholders of Long Beach Federal Savings and Loan Association, demand is hereby made that the administrative hearing provided by Section 206.2 of the Rules and Regula-

tions for Federal Savings and Loan System be held at earliest convenience of the Board.

"Charles T. Smith."

"402 Jergins Trust Bldg.
Long Beach, California."

The reply of the Home Loan Bank Board thereto, was:

"Western Union

"Ta 86 Wm 35
W.CP9 Govt PD-CP Washington DC 23 1019A

1948 Jan 23 AM 753

Charles T. Smith, Linnell and Smith
401-2-3 Jergins Trust Bldg Long Beach Calif.

Under the Regulations hearing referred to in your telegram of January 20 is held at request of Associations Board of Directors. Due to recent developments it is our view that the request for such hearing is not now pending.

William K. Divers
20. Chairman Home Loan Bank Board"

Thereafter, on January 20, 1948, the same attorney for said Long Beach shareholders wrote to appellant Home Loan Bank Board, in part, as follows:

". . . it is respectfully requested that the order made by the Federal Home Loan Bank Board on January 17, 1948, directing that the assets of said association be redelivered to the shareholders, be rescinded, and THAT PURSUANT TO SECTION 206.2 of the Rules and Regulations for the Federal Savings and Loan System, AN ADMINISTRATIVE HEARING BE HELD ON THIS MATTER." (Emphasis added.)

In reply thereto, the Home Loan Bank Board, on January 26, 1948, wrote in part:

> ". . . the United States District Court for the Southern District of California has entered an order which, prior to an election, would return the former officers and directors of the association under the supervision of a Master in Chancery. The court order also provides that the Master in Chancery is to supervise an election to determine the directors of the institution. Under such circumstances, it does not appear that a rescission by the Board of the resolution of January 17 would accomplish a change in the situation.
>
> "Your letter also requests that pursuant to Section 206.2 of the Rules and Regulations of the Federal Savings and Loan System that an administrative hearing be held on this matter. As indicated in my reply to your telegram of several days ago, such hearings under the Regulations are held at the request of the association's directors and it is our view that such a request is not now pending.
>
> Very truly yours,
> (Signed) Wm. K. Divers
> William K. Divers,
> Chairman"
>
> Attachment.

(a copy of Home Loan Bank Board Order No. 388 removing the conservator and ordering him to account with this court was attached).

In the light of this blunt refusal on the part of the Home Loan Bank Board to conduct *any* administrative hearings even though requested by some of the shareholders of the Long Beach Association, can there be any doubt of the right of *all* parties to then have recourse to

the courts to obtain the relief denied by the Board in the refusal of the hearing?

Yet, the opinion of this Court of Appeals holds that no complaint can state a cause of action for *any* relief unless the administrative hearing has been held *and concluded.* The opinion holds that the administrative remedies must have been pursued "to their appropriate conclusion."

If the Court of Appeals' opinion becomes final, the Bank Board, by refusing its hearing, can preclude and prevent filing of any court action until after the statute of limitations has run against the rights of all parties, including the frauds of Home Loan Bank Board and its agents.

The Federal Savings and Loan Insurance Corporation has already (in May of 1951) PLEAD THE STATUTE OF LIMITATIONS against the Shareholders' Protective Committee's action for declaratory relief as to whether or not the insurance of their savings was valid and in force.

The opinion assumes that, although not a party, the Shareholders' Protective Committee would have been permitted to intervene in the administrative hearing. This assumption is completely refuted by the persistent refusal of the Home Loan Bank Board to accord certain of the Long Beach shareholders *any* administrative hearing.

The Board's refusal to proceed with the administrative hearing was, in part, based upon the fact that all parties, including the two shareholders then seeking the administrative hearing, were before the courts with all issues submitted to the Court below by general appearance by Home Loan Bank Board Order No. 388, for decision by the Court on the merits.

III.

FAILURE TO EXHAUST ADMINISTRATIVE PROCESS IS NOT JURISDICTIONAL, NOR DOES IT REQUIRE A DISMISSAL AT THIS STAGE OF THE LITIGATION.

Exhaustion of administrative remedy is not an absolute, unfailing prerequisite to judicial proceedings. Rather it is a matter of degree under the particular facts of the individual case.

The Court of Appeals' opinion holds that the administrative hearing will be subject to court review. The San Francisco, Los Angeles, and Portland Bank case remains for decision with the court below. The newly-filed (1952) actions of the San Francisco Bank and the Federal Home Loan Bank receiver to foreclose on the $7,000,000.00 of collateral are also pending in the court below.

Of necessity the entire case will be tried in some court sometime, but dismissal of the Mallonee action would give appellants the unconscionable advantage of defense of the statute of limitations unless failure to exhaust administrative remedies tolls the running of the statute and the accrual of any cause of action.

The United States Supreme Court has repeatedly held that cases filed in court prior to administrative determination may be retained on the docket pending administrative action. Such holdings are particularly favored when the statute of limitations threatens to prevent a decision on the merits.

Among the United States Supreme Court cases are:

Far East Conference v. United States, ... U. S. ....., 96 Adv. L. Ed. No. 10, page 390, decided March 10, 1952, No. 15 Misc.

(cited in the Court of Appeals' opinion at p. 54).

The Supreme Court said:

"Having concluded that initial submission to the Federal Maritime Board is required, we may either *order the case retained on the District Court docket pending the Board's action* (citing authorities), or order dismissal of the proceeding brought in the District Court . . ."

In our present appeal the "purpose to be served" by holding the case pending on the docket of the court below is to save the thousands of homeowners' titles from being reclouded and to require the removed conservator to account for the seized $26,000,000.00. "A similar suit" cannot easily be initiated after the statute of limitations has run against the rights of the 16,000 shareholders.

See also:

General Amer. T. Car Corp. v. El Dorado Term. Co., 308 U. S. 422-433, 84 L. Ed. 361 (1940),

wherein the Court said at page 369:

"We have said that the Commission insists the District Court was without jurisdiction of the cause. With this we do not agree . . ."

Further:

"When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have

stayed its hand pending the Commission's determination . . . There should not be a dismissal, but, as in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. ed. 1472, 33 S. Ct. 916, *supra,* the cause should be held pending the conclusion of an appropriate administrative proceeding. *Thus any defenses the petitioner may have will be saved to it.*" (Emphasis added.)

See also:

El Dorado Oil Works v. United States, 328 U. S. 12, 90 L. Ed. 1053 (1946).

See also:

United States of America v. Interstate Commerce Commission, 337 U. S. 426, 93 L. Ed. 1451 (U. S. Sup. Ct. 1949).

(at page 464 of U. S. wherein Justice Frankfurter said):

". . . He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination from the Commission. There is no jurisdictional bar to such a procedure . . . Cases . . . have clearly recognized that there is jurisdiction to hold the case and this procedure has been suggested in a number of them . . . (citing authorities) . . ."

See particularly footnote No. 13, which reads in part:

". . . This procedure has the advantage of preventing the statute of limitations from running on the shipper while awaiting Commission decision . . ."

Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132, U. S. Sup. Ct., 1946. Texas State Court terminated trackage lease prior to I. C. C. hearings.

The Court said at page 1143 of L. Ed.:

> "Thus, however, the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, JUDICIAL ACTION IS PREMATURE. The judgment will be reversed and the cause REMANDED so that THE CASE MAY BE HELD PENDING THE CONCLUSION OF APPROPRIATE ADMINISTRATIVE PROCEEDINGS." (Emphasis added.)

In *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63, C. C. A. 9, 1949, this Court of Appeals said at page 66:

> ". . . Trans-Pacific was under the jurisdiction of the Board, and the district court had no power to interfere. The District Court of Hawaii therefore had no jurisdiction to proceed, *but should have held the cause in abeyance until the board made a primary determination* . . ." (Emphasis added.)

In *S. S. W. v. Air Transport,* 191 F. 2d 658, C. C. A.-D. C., 1951, the Court said at page 664:

> ". . . The District Court should retain jurisdiction of the antitrust suit while appellant seeks his remedies from the Board. . . . The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation. . . ."

On numerous occasions the U. S. Supreme Court has reversed dismissal by lower courts and ordered actions, prematurely brought, nevertheless to remain pending on the docket of the District Court until appropriate for decision.

American Federation of Labor v. Watson, 327 U. S. 582, 90 L. Ed. 873, U. S. Sup. Ct., 1946, wherein the Supreme Court said:

(P. 883 of L. Ed., p. 599 of the U. S.):

". . . In Railroad Commission v. Pullman Co., 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; Chicago v. Fieldcrest Dairies, 316 U. S. 168, 86 L. ed. 1355, 62 S. Ct. 986, and Spector Motor Service v. McLaughlin, 323 U. S. 101, 89 L. ed. 101, 65 S. Ct. 152, all *supra,* we held that under such circumstances the proper course was for the District Court to retain the bill until a definite determination of the local law questions could be made by the state courts.

". . . The resources of equity are not inadequate to deal with the problem so as to avoid unnecessary friction . . .

"We reverse the judgment of the District Court and REMAND the cause to it WITH DIRECTIONS TO RETAIN THE BILL PENDING the determination of proceedings in the state courts in conformity with this opinion." (Emphasis added.)

In *Spector Motor Service v. McLaughlin,* 323 U. S. 101, 89 L. Ed. 101, U. S. Sup. Ct., 1944, the Supreme Court said at page 104 of L. Ed.:

". . . by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

"We think this procedure should be followed in this case. . . .

"We therefore vacate the judgment of the Circuit Court of Appeals and REMAND the cause to the District Court WITH DIRECTIONS TO RETAIN THE BILL PENDING the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion." (Emphasis added.)

Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, 85 L. Ed. 971, U. S. Sup. Ct., 1941, wherein the Court said at page 498 of U. S.:

"The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. . . .

". . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. . . .

"We therefore REMAND the cause to the district court, WITH DIRECTIONS TO RETAIN THE BILL PENDING a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare Atlas L. Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 573, 83 L. ed. 987, 994, 59 S. Ct. 657, and cases cited." (Emphasis added.)

Dismissal now would needlessly recloud the titles of thousands of homeowners, would prevent decision on the merits of the removed conservator's accounting; would nullify the interpleader statutes; and would require immediate refiling, in other courts, of thousands of separate actions, all seeking decisions of the very questions now

pending before the court below, and which must again come before the court for final decision upon judicial review of the administrative hearings, authorized by the Court of Appeals' opinion.

Dismissal would benefit no one except those unwilling or unable to account for their dealings with $26,000,000.00 of the shareholders' seized assets. It would cause an overwhelming multiplicity of actions and grave hardships, and the bar of the statute of limitations would result to the shareholders, homeowners, borrowers, and others, in no way at fault in the litigation between appellants and appellees.

IV.

POWER OF A REVIEWING COURT PRIOR TO CONCLUSION OF ADMINISTRATIVE PROCEEDINGS.

The Court of Appeals' opinion decides that the administrative hearing was, in 1946, and now is, subject to judicial review. The opinion also, we respectfully urge, is erroneous if it decides that such review proceedings cannot be initiated, or any steps therein commenced, until the final conclusion of the administrative action.

The Administrative Procedure Act, Title 5, U. S. C. Section 1009, subdivision (d), reads in part:

> "(d) INTERIM RELIEF.—Pending judicial review . . . Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

In addition to such express statutory authority, every reviewing court has inherent power,

> ". . . to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong . . ." (*Scripps-Howard v. F. C. C.*, 316 U. S. 4, 86 L. Ed. 1229, U. S. Sup. Ct., 1942.) (Cited in Court of Appeals Opinion at p. 34.)

The power of stay is not postponed until final determination of the administrative proceeding. It exists because of, and for the protection of, the subsequent right of review by the appellate or reviewing court.

In *Board of Governors of Federal Reserve v. Transamerica,* 184 F. 2d 311-326 (three opinions), C. C. A. 9, 1950, this Court of Appeals issued, in aid of its appellate jurisdiction, an *ex parte* writ of injunction during the pendency of the administrative hearing before the Federal Reserve Board, and upon hearing of the order to show cause said writ of injunction was made permanent.

This Court of Appeals said in its first opinion on pages 315 and 316:

> ". . . the jurisdiction of this court to issue an extraordinary writ in aid of its own jurisdiction is not delayed until the jurisdiction of this court is actually invoked. The writ may be issued to prevent frustration of the ultimate exercise of its jurisdiction even before an appealable or reviewable order has been entered in the tribunal below. . . .
>
> ". . . our power to protect that jurisdiction is comparable to that of a district court which is confronted with a threat by litigants, or by third persons, to destroy its jurisdiction, as for example, in the case

of a threatened destruction or removal of a *res in custodia legis*. . . .

". . . To say that under the circumstances no court could do anything would lead to complete frustration . . ."

In *Barber Asphalt Paving Co. v. Morris,* 132 Fed. 945, C. C. A. 8, 1904, the appellate court said:

". . . The primary reason for the grant to the federal appellate courts of the dominant power to issue their writs . . . in the exercise of and in aid of their appellate jurisdiction was to enable them to protect that jurisdiction against possible evasions of it. It is not less evident that the grant must in many, nay, in most, cases, fail to accomplish its chief end if the power to issue the writ can be exercised only after the appellate jurisdiction has been actually invoked by an appeal or by a writ of error. . . ."

The first intimation that the Association or its shareholders had of any charges against the Association was its seizure on May 20, 1946, by the signing by conservator Ammann of his own order of appointment in the premises of the Association.

A final federal court judgment has been entered removing said Ammann from the premises, and restoring the remnants of the assets to the Association.

The judicial review of that administrative hearing (under Order No. 2015) which the Court of Appeals' opinion holds exists, will be futile and fruitless, unless enforcement of the order resulting from the administrative hearing be stayed pending court review. SUCH STAY CANNOT BE EFFECTIVE AFTER A SECOND SEIZURE OF THE

ASSOCIATION. The $10,000,000.00 run provoked by the first seizure will be modest compared to the public hysteria and panic occasioned by a second unannounced seizure, followed by an attempt by a reviewing court to remove the seizing officers and the explosion of legal proceedings incident thereto.

The stay power of the reviewing court is helpless unless this Court of Appeals

> ". . . order the case retained on the district court docket pending the board's action. . . ." (*Far East Conference v. U. S., Sup. Ct.,* March, 1952, 96 Adv. L. Ed. No. 10, page 390; *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63, C. C. A. 9, 1949.)

If the administrative hearing, which will result in two trials rather than one, must be endured as ordered by the Court of Appeals, surely two seizures with the attendant runs, creation of $7,000,000.00 liabilities, assignments and transfers of $14,000,000.00 of seized assets in defiance of restraining orders, must not be the burden of the Association and its shareholders, in order to obtain the right of judicial review expressly granted by Congress in the Administrative Procedure Act.

Particularly it seems unjust to endure these burdens of confiscation and oppression when, as the court below has found, the public interest and the interests of the Home Loan Bank Board are fully protected by the $1,000,000.00 bond furnished by the officers of the Association and filed with the Court Below. [Finding No. 21, R. 8233, and Finding No. 64, R. 8376.]

V.

CONSTITUTIONAL QUESTIONS ARE NOT DECIDED WITHOUT JURISDICTION.

By settled policy, the Supreme Court refuses to consider a constitutional question if any other basis for decision can decide the appeal.

In *Alma Motor Co. v. Timken-Detroit Axle Co.,* 91 L. Ed. 128, 329 U. S. 129 (1946), at 136 of U. S., the Court says:

> "This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. . . ."

Thus, in *Aircraft, etc. v. Hirsch,* 331 U. S. 752, 91 L. Ed. 1796 (1947), and *Macauley v. Waterman Steamship Corp.,* 327 U. S. 540, 90 L. Ed. 839 (1946), exhaustion of administrative remedies, and not the constitutional questions, was the subject of Supreme Court opinions and decisions.

In *Republic Natural Gas v. Oklahoma,* 334 U. S. 62, 92 L. Ed. 1213, U. S. Sup. Ct., 1948, the Court says at page 70 of U. S.:

> ". . . Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. . . . The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction."

Decision of the constitutional question required jurisdiction in the Court below, on the *then* pleadings, to enter the judgment reversed by the Supreme Court, otherwise there was no constitutional question susceptible to decision by the Supreme Court. The Court of Appeals'

opinion, if it holds the District Court was without jurisdiction in 1946-1947, wipes out the *Fahey-Mallonee* decision of the U. S. Supreme Court, in 332 U. S. 245, 91 L. Ed. 2030.

VI.

SUPREME COURT PASSED ON ADEQUACY OF PLEADINGS.

The opinion states that the District Court should have dismissed all five complaints and pleadings of appellees in September of 1946, or at the latest, in the Fall of 1947, and that in not so doing, it committed error.

This opinion of the Court of Appeals is directly contrary to, and in conflict with, the result of *Fahey, et al. v. Mallonee, et al.,* in the U. S. Supreme Court in 1947.

Appellants, in their 1947 brief to the U. S. Supreme Court, made the following statements. (On p. 28, subd. (A)):

> "A. Judicial Relief Is Not Available Until Appellees Have Exhausted Their Administrative Remedy.
>
> "The complaint of appellee-shareholders and of the appellee-Association should have been dismissed as premature because these appellees have not exhausted their administrative remedies.[15] . . ."
>
> (Footnote)
>
> "15. Dismissal of these complaints would necessarily lead to dismissal of the interpleaded cross-claims which rest upon the main claims."

Again on page 31:

> "Appellees' complaint should, therefore, have been dismissed under the 'long settled rule of judicial

administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540; *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 123; *Federal Power Comm. v. Arkansas Power & Light Co.*, this Term, No. 543, decided *per curiam* March 10, 1947. No reason appears why appellees should not have proceeded with the administrative hearing which they initiated, and if the outcome proved unsatisfactory, thereafter sought judicial relief. . . ."

The Supreme Court, however, considered the pleadings then before it and commented upon them, at page 247 of the U. S. and at page 2035 of the L. Ed.:

"Plaintiffs at once commenced this class action. . . . The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution. It asked return of the Association to its former management, permanent injunction against further interference, and other relief. OTHER PARTIES IN INTEREST INTERVENED. . . .

". . . Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action. . . ." (Emphasis added.)

On page 257 of the U. S. and 2040 of the L. Ed., the Supreme Court said:

". . . Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

". . . One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. . . .

". . . It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we made no determination or intimation concerning the *merits* of these issues or as to other remedies or relief than that in the judgment before us. . . .

". . . and this without prejudice to any other administrative *or judicial proceedings* which may be warranted by law. . . ." (Emphasis added.)

At the same time that this decision was rendered, there was before the U. S. Supreme Court a petition for "a writ of mandate and/or prohibition and/or injunction" against the District Court to prevent any further proceedings in the Court below with particular reference to an allowance of $50,000.00 out of assets in the registry to the attorneys for plaintiffs, Shareholders' Protective Committee.

In *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, these writs were denied. Thereafter, on August 19, 1947, there was filed with the Court below, the mandate from the U. S. Supreme Court [R. 2302, Appeal No. 12511], which reads in part as follows:

"And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court."

In the petition for writs of prohibition, mandamus and/or injunction, filed with the U. S. Supreme Court in April of 1947, on page 23 of the memorandum appellants state in part:

> ". . . if the court agrees with our view . . . in the interests of justice it should prevent further protracted and unnecessary litigation (undoubtedly including further appeals) by issuing the writ, . . ."

The Supreme Court however, in passing upon this writ, said:

> ". . . We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court . . ."
>
> *Ex parte Fahey,* 91 L. Ed. at 2043, 332 U. S. at 260.

Appellants thereafter in 1947 took such appeal (No. 11751 in this Court of Appeals, 1947).

The order of the District Court appealed from contained the finding:

> "The court has jurisdiction of the parties and of the subject matter involved."

Appellants appeal was thereafter (1948) dismissed. This finding passed upon the question of the sufficiency of the pleadings THEN before the District Court. Both the United States Supreme Court and this Court of Appeals, in 1947 and 1948, decided and acted upon such jurisdiction of the court below.

The effect of such dismissal is decided in:

United States v. Munsingwear, 340 U. S. 36, 95 L. Ed. 36, U. S. Sup. Ct., 1950.

The United States Supreme Court said:

". . . There is no question but that the District Court in the injunction suit had jurisdiction both over the parties and the subject matter. And its judgment remains unmodified . . . The question . . . having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations.

"In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.

". . .

"The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation.

"Affirmed."

Every original pleading condemned by the opinion of the Court of Appeals as not stating a cause of action sufficient to grant *any* relief was likewise before the U. S. Supreme Court in 1946, was attacked by appellants and dismissal thereof sought. The Supreme Court, in its opinion, expressly mentioned the motion to dismiss by defendant Ammann. The attack was unsuccessful. Nowhere in the Supreme Court opinion or in the mandate is there

one word as to dismissal of the action either for failure to exhaust administrative remedies or otherwise. The very citations of authority relied upon by the Court of Appeals as authority for now, six years later, dismissing the action, the Supreme Court then refused to dismiss, were cited to, and considered by, the Supreme Court, and did not persuade the Supreme Court to make any order of dismissal.

The Supreme Court certainly, had it intended dismissal, could have used appropriate language in either the opinion or the mandate to order such dismissal at that time. If the complaints were so fatally defective that they not only failed to state a cause of action, but could not under any circumstances ever be amended to state a cause of action, the Supreme Court would have directed dismissal in its mandate or in its opinion, and ordered the litigation then terminated.

Four of the pleadings condemned by the Court of Appeals' opinion as failing to state a cause of action, and which "should have been dismissed in September of 1946," are yet in the *identical form* in which they were considered by the Supreme Court. They are:

1. Third-Party Complaint, of Long Beach Federal Savings and Loan Association, filed July 1, 1946 [R. 286-302];

2. Answer and Cross-claim in Interpleader, of Title Service Company, filed June 4, 1946 [R. 43-56];

3. Complaint by Intervener Home Investment Co. of Long Beach, a Corporation, filed July 8, 1946 [R. 260-279];

4. Answer and Cross-claim in Interpleader of Robert H. Wallis, filed June 12, 1946 [R. 86-100].

The Supreme Court, when it desires a case dismissed, is able to say so. Its views on opinions or mandates which do not expressly direct dismissal are stated in:

Rogers v. Hill, 289 U. S. 582, 77 L. Ed. 1385, U. S. Sup. Ct., 1933.

The Supreme Court said at page 1389 of L. Ed.:

> "Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose . . ."

VII.

COMPLAINTS DID STATE CAUSE OF ACTION.

The Court of Appeals states at page 52 of the opinion, that the original complaints, cross-claims, motions, etc., fail to state a claim upon which ANY relief could be granted by a Federal Court, because the complaints did not allege the exhaustion of the administrative remedy.

The Shareholders' Complaint [R. 23], the Association's Third-Party Complaint [R. 299], and the Association's Cross-claim [R. 355], each and all did state causes of action.

The relief sought by these pleadings went beyond anything that could be accomplished as a result of any administrative hearing. The pleadings prayed judgments holding acts of Congress unconstitutional. In the meantime they sought to preserve the Association from merger, liquidation, destruction and dispersion of its assets.

Less than sixty days previously, the $46,000,000.00 Los Angeles Bank had been instantly and permanently liquidated, merged and dissolved, without notice to anyone.

Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030, U. S. Sup. Ct., 1947.

The Court said on page 257 of the U. S., and at page 2041 of the L. Ed.:

> "One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. The allegation seems to be based on the fact that a different institution with which the management of the Long Beach institution was connected was merged by the authorities in a way that was highly objectionable to some of the shareholders and aroused concern of the public authorities. . . . The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or of evidence to sustain one, we accept the Government's assurance that merger will not follow . . ."

It is indeed significant that the Supreme Court did not enunciate the doctrine that no cause of action could be stated to enjoin any mergers until after "exhaustion of administrative remedies" and final conclusion of administrative hearings.

If, as the Court of Appeals' opinion holds, the pleadings could state no cause of action for *any* relief, then appellants are free to merge the Long Beach Association at any time they desire and thereby to frustrate all rights of judicial review.

On page 34 of the Court of Appeals' Opinion, the statement is made:

> ". . . the reviewing court would have ample authority to preserve the status of all parties . . ."

Exercise of this exact authority was sought as part of the relief demanded by the Mallonee-Association pleadings at the initiatory stage of this litigation when the plaintiffs and the Association sought injunctions against the merger and destruction of the Association before the reviewing court could try the action.

This right of review would be fruitless, indeed, if the Association were already merged or liquidated as was the Los Angeles Bank. More than six years have passed since the summary seizure, liquidation and merger of the Los Angeles Bank and thus far the stockholders of the seized bank have had no relief whatsoever. Prevention of such merger is clearly within the power of the reviewing court BEFORE THE CONCLUSION OF THE ADMINISTRATIVE PROCEEDINGS.[2]

The actions in the court below should be allowed to remain pending on their docket for the purpose of protection of the parties pending review of the final administrative decision.

Some $6,000,000.00 of United States Government Bonds, owned by Long Beach Association, were seized by San Francisco Bank, when it took the Los Angeles Bank. The Association's Third-Party Complaint [R. 286-302] sought accounting for, among other things,

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[2]See *Board of Governors, etc. v. Transamerica,* 184 F. 2d 311-326 (three opinions) (C. C. A. 9, 1950).

the seized $6,000,000.00 of Government Bonds. It also sought Declaratory Relief as to which bank, Los Angeles, Portland or San Francisco, existed, and in which bank Long Beach Association was a stockholder and member.

These same issues raised in the Los Angeles Bank Complaint, filed two months later in August, 1946, appear, by the Court of Appeals' opinion, to state a cause of action. Why the same matters raised in July in the Association's Third-Party Complaint, "failed to state a claim upon which *any* relief could be granted," requires clarification.

The pleadings likewise stated causes of action against other defendants dealing with the seized Los Angeles Bank-Los Beach Association assets.

Exhaustion of administrative remedies could not require that the owner of $26,000,000.00 seized, as he alleges, in violation of the United States Constitution, must await years of delay of an administrative hearing before taking any action to save and preserve his seized property for future recovery. Administrative and judicial processes must often proceed concurrently and neither need be entirely exclusive of the other.

See:

General American Tank Car v. El Dorado Terminal, 308 U. S. 422, 84 L. Ed. 361 (1940);

Thompson v. Texas-Mexican R. Co., 328 U. S. 134, 90 L. Ed. 1132 (1946);

Smith v. Hoboken, etc., 328 U. S. 123, 90 L. Ed. 1123 (1946).

VIII.

ASSOCIATION SAVED FROM MERGER AND DISSOLUTION BY 1946 COURT ACTION.

The Court of Appeals' opinion, on page 34, states:

> "The reviewing court would have ample authority to preserve the status of all parties"

but the opinion also states, on page 52, that all the original complaints, cross-claims, etc.,

> "failed to state a claim upon which *any* relief could be granted by a federal court."

The original pleadings alleged an immediate threat to merge, dissipate, and break up the Long Beach Association, so as to preclude and prevent any court review or recovery of the seized Association or assets [R. 18-19, Appeal No. 12511]. A Temporary Restraining Order to prevent such merger was issued by the District Court on May 27, 1946 [R. 33-34].

Both under the inherent power of reviewing courts and the express sections of the Administrative Procedure Act, injunction or stay, preventing such mergers, was essential to protect the jurisdiction of the reviewing court, either to decide the constitutional question decided in September of 1946 by the three-judge court, and in June of 1947 by the United States Supreme Court, or to review Final Order No. 388 of the Home Loan Bank Board, removing the conservator and ordering an accounting. Merger must be prevented before it occurs.

See:

Board of Governors v. Transamerica, 184 F. 2d 311-326 (3 opinions) (C. C. A. 9, 1950).

The court below AFTER THE REMAND from the United States Supreme Court, and the Supreme Court discussion of threatened merger, made further findings in September of 1947, BEFORE ANY AMENDMENT OF THE PLEADINGS was allowed, in which it found at R. 2355-2358, as follows:

"(7) That the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and memberships by commingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and . . .

"(8) That the filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, re-organizing or uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and

irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, . . .

". . .

". . . That in the six days from the date of seizure on May 20, 1946, of the said association's property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars ($6,000,000.00) or at the rate of approximately one million dollars ($1,000,000.00) a business day; that the filing of the within action on the 27th day of May, 1946, preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars ($2,000,000.00) or at the rate of only approximately forty-eight thousand dollars ($48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or completely destroyed by the withdrawal of shareholder members, . . ."

Appellants in 1947 appealed this order to the Court of Appeals for the Ninth Circuit (appeal No. 11751). The appeal was dismissed in 1948.

All of the 1946-1947 intervention proceedings in which more than $1,500,000.00 was deposited in the registry of

the court were in aid of the court review and were "necessary and appropriate process" to "preserve the status of all parties."

In the first intervention order granted July 13, 1946 (about six weeks after the commencement of the litigation) [R. 527], the District Court found:

> ". . . the rights heretofore existing of each and every party to this action, except as to the Intervener Home Investment Co. of Long Beach, a corporation, its successors or assigns, be and the same are hereby expressly reserved and preserved without prejudice and shall be enforced against the said sum of deposited money to all intents and purposes as though said reconveyances had not been executed and delivered pursuant to this Order."

($800,000.00 was deposited to clear the titles to 174 homes under this order.)

If, as the Court of Appeals' opinion holds, the District Court should have dismissed all five actions, INCLUDING THE HOME INVESTMENT CO. INTERVENTION TO CLEAR TITLES, the jurisdiction of that court to preserve the status of all parties, is difficult to comprehend. Final dismissal of a pending action for failure to state a claim upon which *any* relief can be granted would seem to deprive the courts at that stage, at least, from making any order to preserve the "status of all parties," and "avoid such a suggested hazard."

IX.

JURISDICTION DOES NOT DEPEND UPON LEGAL SUFFICIENCY OF THE FACTS ALLEGED.

The Court of Appeals' opinion, at page 52, states:

> ". . . the original complaints, cross-claims, motions and other documents of the Mallonee-Association group failed to state a claim upon which *any* relief could be granted . . . We need not labor the point that if these original pleadings did not present a 'case' (a justiciable controversy) . . . the court was without jurisdiction . . ."

Appellee respectfully urges this statement is erroneous.

In

Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939, U. S. Sup. Ct., 1946,

At page 682 of the U. S., and at page 943 of the L. Ed., the United States Supreme Court said:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided AFTER AND NOT BEFORE the court has assumed jurisdiction over the controversy. . . ." (Emphasis added.)

In

Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308 (1923),

the United States Supreme Court said at page 314 of L. Ed. and page 305 of U. S.:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well

as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this JURISDICTION CANNOT BE MADE TO STAND OR FALL UPON THE WAY THE COURT MAY CHANCE TO DECIDE AN ISSUE AS TO THE LEGAL SUFFICIENCY OF THE FACTS ALLEGED any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it . . ."

Schlosser v. Welsh, 5 Fed. Supp. 993, Three-judge Statutory Court—1934.

Before Gardner and Sanborn, Circuit Judges (C. C. A. 8), and Wyman, District Judge.

"(7, 8) 'Unsuccessful as well as successful suits may be brought' in a federal court, and in either case THE ULTIMATE OUTCOME IS NOT THE TEST OF JURISDICTION. The Fair v. Kohler Die Co., 228 U. S. 22, 33 S. Ct. 410, 411, 57 L. Ed. 716. . . .

* * * * * * * * *

"(11) Jurisdiction being assumed, it extends to the determination of all questions involved, . . . regardless of what disposition, if any, is made of the question presented upon which jurisdiction rests. (Citing authorities.) . . ." (Emphasis added.)

Even though the District Court itself concluded that the pleadings failed to state a claim upon which any relief could be granted, and dismissed on that ground, it yet had jurisdiction to issue its injunction or stay pending final decision by the Court of Appeals or U. S. Supreme Court of that question.

Cases in which this procedure has been followed, are:

Columbia Broadcasting System v. United States, 316 U. S. 407, 86 L. Ed. 1563, U. S. Sup. Ct. (1942).

At page 409 of the U. S. and at page 1566 of the L. Ed., the U. S. Supreme Court said:

> ". . . The case was heard by a court of three judges, which permitted the Commission and the Mutual Broadcasting Company to intervene as defendants. It granted appellees' motion to DISMISS the complaint FOR WANT OF JURISDICTION, 44 F. Supp. 688, AND STAYED THE OPERATION OF THE COMMISSION'S ORDER pending direct appeal to this Court." (Emphasis added.)

While the District Court was deciding whether or not the complaints state a cause of action upon which relief could be granted, and the Court of Appeals and the Supreme Court were determining whether or not this decision was correct, jurisdiction to enjoin, pending finality of the trial court's dismissal and also to clear the homeowners' titles, existed in the District Court.

Decision of whether or not the complaints state a cause of action upon which relief can be granted is of itself an exercise of jurisdiction. Jurisdiction includes the power to decide the case, either on the pleadings or after trial on the facts, and it includes the power to decide the case erroneously as well as correctly. When such decision, whether erroneous or correct, becomes final, it is binding but only as to the exact pleadings dismissed.

X.

THREE JUDGE COURT PROPERLY CONVENED RETAINS JURISDICTION IN ONE JUDGE TO DECIDE THE ENTIRE CONTROVERSY INCLUDING COUNTERCLAIMS.

The jurisdiction of the three-judge court under old Title 28, Section 380(a) (now Title 28, U. S. C., Section 2282), was properly invoked on the constitutional question raised. Otherwise the U. S. Supreme Court, in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, could not have decided the constitutionality of Section 5(d), Home Owners' Loan Act—the act of Congress authorizing appointment of conservators generally.

Such jurisdiction properly invoked in three judges continues in one judge for disposition of the merits of the entire controversy, particularly for decision of counterclaims or cross-claims, for damages, attorneys' fees and costs.

Dismissal by the three-judge or one-judge court, without decision of such counterclaims on the merits, is reversible error.

In *Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc.,* 312 U. S. 621, 85 L. Ed. 1083 (1941), the U. S. Supreme Court said:

> ". . . Petitioners, in their answer to respondents' complaint, counter-claimed for fees and licenses the respondents had failed to pay in the past[2] and later amended the counter-claim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three judge court found the Bus and Truck Law constitutional, dissolved the restraining order, dismissed the truck operators' bill, and also ordered the counter-claim dis-

missed without prejudice because of 'serious doubt as to the right of the defendants to maintain' such an action. . . ."

Further:

". . . For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. . . . If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship . . . if petitioners succeed on the merits, there might conceivably be serious problems raised by the seventy-six respondents as to the portion of damages fairly attributable to each—a problem peculiarly appropriate to equity, and pre-eminently adapted to settlement by a single court. . . . The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion."

Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375, U. S. Sup. Ct., 1932.

Action to enjoin as violation of the Federal Constitution, order of Texas Governor calling out state militia to enforce oil curtailment program. The Supreme Court said at page 383 of L. Ed., and at page 393 of U. S.:

"As the validity of provisions of the state constitution and statutes, . . . was challenged, the application for injunction was properly heard by three

judges. . . . THE JURISDICTION of the District Court so constituted, and of this Court upon appeal, EXTENDS TO EVERY QUESTION INVOLVED, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. . . ." (Emphasis added.)

Further at page 388 of L. Ed., and page 404 of U. S:

". . . Complainants had a constitutional right to resort to the Federal Court to have the validity of the Commission's orders judicially determined. . . ."

Further at page 385 of L. Ed., and page 397 of U. S.:

". . . appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, . . ."

R. R. Com. of Cal. v. Pacific G. & E. Co., 302 U. S. 388, 82 L. Ed. 319, U. S. Sup. Ct., 1938.

Three Judge Court held the order complained of unconstitutional and did not decide facts as to confiscation. The Supreme Court reversed, held the order constitutional, and remanded to the district court for trial of the merits.

The U. S. Supreme Court said at page 391 of U. S. and at page 321 of L. Ed.:

> ". . . Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. . . . (Citing authorities.)"

Again at page 401 of U. S. and at page 327 of L. Ed.:

> "The main issue in this litigation is whether the rates . . . are confiscatory. The District Court did not determine that issue. The District Court should determine it. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion."

In *Sovereign, etc. v. Murphy,* 17 Fed. Supp. 650 (1936) (Before Woodrough, Circuit Judge, and Dewey and Nordbye, District Judges), the Three-Judge Court said at page 652:

> ". . . But the duty imposed on the three-judge court by the federal statute to hear and determine the plaintiff's suit for injunction against the attempted application to it of the alleged unconstitutional state tax statute carried with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be relegated to piecemeal trials of the several issues joined by them in their case. . . . (Citing authorities.) . . ."

In *Firemen's Insurance Co. v. Beha,* 30 F. 2d 539 (Affirmed 278 U. S. 580, 73 L. Ed. 517), Three-Judge Statutory Court, 1928 (before L. Hand, Circuit Judge, and Knox and Thacher, District Judges), the three-Judge Court convened to hear a constitutional question and held constitutional the actions challenged, but nevertheless held

the case for trial on the non-constitutional merits. The Three-Judge Court said on page 540:

> "L. HAND, Circuit Judge . . . However, unless the constitutional questions raised be colorable or fraudulent, our jurisdiction as a statutory court extends to the local question, even though we do not have to decide it. . . . (citing authorities) . . . As we are not prepared to say that the constitutional questions are merely colorable, we see no escape from disposing of the bill IN ITS ENTIRETY." (Emphasis added.)

On page 542:

> "The motion for a preliminary injunction is denied, and the stay is dissolved. IN VIEW OF THE ALLEGATIONS IN THE BILL OF THE DEFENDANT'S ARBITRARY DISCRIMINATION, IT CANNOT BE DISMISSED. Motion to dismiss denied." (Emphasis added.) (Affirmed 278 U. S. 580, 73 L. Ed. 517.)

XI.

JURISDICTION UPON A CROSS-CLAIM IS NOT DEPENDENT UPON THE ORIGINAL COMPLAINT.

The Opinion of the Court of Appeals states at page 52:

> ". . . If the relief then demanded from the Court by the Mallonee-Association Group was improperly and unlawfully granted by the Court, it is certain that the ancillary and subsidiary claims of these litigants which arose only out of the claims of Association, were without substance in law. The validity of their claims rested upon the validity of the claims of association. If the claims of association were untenable in law it is obvious that the claims of these litigants could rise no higher than their source. . . ."

No authorities are cited for this statement; there are authorities to the contrary.

In *Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc.,* 312 U. S. 621, 85 L. Ed. 1083 (1941), wherein the U. S. Supreme Court said:

> ". . . Petitioners, in their answer to respondents' complaint, counter-claimed for fees and licenses the respondents had failed to pay in the past and later amended the counterclaim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three-judge court . . . dismissed the truck operators' bill, and also ordered the counterclaim dismissed . . ."

The U. S. Supreme Court reversed and said:

> ". . . For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. . . . If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. . . . The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion."

In *Sunflower Oil Company v. Wilson,* 142 U. S. 313, 35 L. Ed. 1025 (1892), U. S. Supreme Court decided that jurisdiction should be retained and the entire case decided on the merits in reliance upon a Cross-Bill in equity even though the original bill by which the action was brought was dismissed and all relief denied. The Supreme Court said at page 325 of the U. S., and at page 1029 of the L. Ed.:

> "Under the circumstances of this case and in view of the fact that a Court of Equity takes jurisdiction of all questions with respect to this property as an-

cillary to its jurisdiction over the main case, the dismissal of the intervening petition does not necessarily involve the dismissal of the cross-petition, and the court, having jurisdiction of the entire proceeding, may proceed to do complete justice between the parties."

In *Railway Express v. Jones,* 106 F. 2d 341, C. C. A. 7, 1939, defendant moved to file a counterclaim which was a bill in the nature of interpleader. District Court denied the right to file the counterclaim on the ground that the original complaint failed to state a cause of action within the jurisdiction of the Federal courts.

Collector of Internal Revenue asserted a lien upon the money in the hands of the interpleader.

The Court of Appeals said at page 343:

". . . The Railway Express' right to file its interpleader is not established nor defeated by the merits of Plaintiffs' claim."

The Court of Appeals further said at page 345:

"By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable, and the claims of all litigants may be litigated exactly the same as in a proper class suit.

"It therefore follows that as matter of wise discretion, as well as of recognizing a right which the Railway Express possessed absolutely, the court should, after the counterclaim was filed, have proceeded as provided for by the interpleader Statute.

"The orders appealed from are reversed with directions to permit the filing of the counterclaim and to proceed further in this suit on said counterclaim." (Emphasis added.)

See also:

San Diego Flume Co. v. Souther, 90 Fed. 164, C. C. A.-9, 1898.

District Court dismissed both original complaint and cross-bill in equity upon the ground that the original bill of complaint stated no facts which would justify the relief prayed for. In 90 Fed. at 164, C. C. A. 9 reversed and held the cross-bill had independent grounds of federal jurisdiction, affirmed the dismissal of the original complaint, and said at page 171:

> "The decree dismissing the cross-bill will be set aside, and the cause remanded to the circuit court for further proceedings in accordance with the foregoing views."

Rehearing was sought and granted, and in 104 Fed. 706, C. C. A. 9 said at page 708:

> "We have no doubt of the correctness of our former ruling, that the judgment of the circuit court should be reversed, and the cause remanded for further proceedings in accordance with these views. It is so ordered."

Upon remand, the district court proceeded on the cross-bill alone after dismissal of the original complaint for failure to state a cause of action, and said in 112 Fed. at page 228:

> ". . . the cross-complainant is entitled to the relief prayed. There will be a decree accordingly."

On a second appeal to the Ninth Circuit Court of Appeals, at 121 Fed. 347, the C. C. A. 9 said:

> "The decree of the Circuit Court is modified by deducting therefrom the sum of $685 . . . and as thus modified is affirmed, with costs."

These decisions of the Ninth Circuit Court of Appeals were cited and followed in:

> *Vidal v. South American Securities Co.,* 276 Fed. 855, C. C. A. 2, 1922.

where, on rehearing, C. C. A. 2 reversed itself (and the district court) and said at page 874:

> "(13, 14) As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, . . . they should not have been dismissed, but should have been treated as original bills upon the dismissal of the original bill. . . ." (Citing authorities.)

See also:

> *Isenberg v. Biddle,* 125 F. 2d 741, C. C. A. D. C., 1941,

wherein the court said at page 743:

> ". . . when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint . . ."

See also:

Barber Asphalt Corp. v. La Fera etc., 116 F. 2d 211, C. C. A. 3, 1940,

wherein the court said at page 217:

". . . the cause is remanded with directions to dismiss the complaint for want of equity, to reinstate the counterclaim and to enter judgment granting relief thereunder."

See also:

Lion Mfg. Corp. v. Chicago Flexible etc., 106 F. 2d 930, C. C. A. 7, 1939,

wherein the court said at page 933:

". . . the dismissal of the bill of complaint did not preclude a trial and determination of the issues presented by the counterclaim and answers thereto . . ."

Home Investment Company interplead $800,000.00 into Federal Court to clear the titles to 174 Southern California homes. The administrative hearing could never quiet the titles to the 174 homes. Its Congressionally-created right to interpleader relief to quiet its titles could not be repealed by failure to exhaust an administrative remedy which it did not have.

XII.

INTERPLEADERS WERE VALID REGARDLESS OF VALIDITY ON THE ORIGINAL ACTION.

The Court of Appeals in its Opinion, at page 53, states that all five of the original complaints and proceedings should have been dismissed "for the reason that they failed to state a claim upon which relief could be granted, and for the further reason that Association had failed to exhaust tendered and available administrative remedies . . ."

Home Investment Company, an entirely separate and independent corporation, a borrower from Association, cannot be precluded from interpleader relief created by the statutes of the United States because of any omission of Association.

The right of one met by conflicting and contradictory claims and demands to obtain the relief of interpleader is not dependent upon the validity, merits or good faith of either or both of the conflicting claims. This must of necessity be so, for it would be unusual if BOTH of the conflicting claimants should eventually BOTH recover the total amount due to only one of them. In *Hunter*

v. Federal Life Insurance Company, 111 F. 2d 551, C. C. A. 8, 1940, at page 556, the Court of Appeals says:

> "The jurisdiction of a Federal Court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants . . ."

In *Railway Express v. Jones,* 106 F. 2d 341 (C. C. A. 7, 1939), the Court of Appeals said at page 343:

> "The Railway Express' right to file its interpleader is not established nor defeated by the merits of plaintiffs claim . . . By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable . . ."

In *Metropolitan Life v. Segartis,* District Court of Pennsylvania, 1937, 20 Fed. Supp. 739, the Court says at page 741:

> ". . . the jurisdiction of this court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and cannot affect the jurisdiction of the court . . ."

In *Massachusetts Life v. Edner,* District Court of Pennsylvania, 73 Fed. Supp. 300 (1947), the Court said at page 303:

> ". . . the right to an interpleader, under the aforesaid Act is not dependent upon the good faith of both claimants or the strength of their claims . . ."

Home Investment Company was wholly indifferent as to whether it paid Ammann or paid the Association, but it was vitally interested that whichever one it paid was the correct one, and that it had to pay its $800,000.00 debt only once, to one claimant, and not twice to both claimants.

The Opinion of this Court of Appeals would appear to prevent any borrower from ever obtaining clear title to his home if the Association from whom he borrowed the money refused or delayed administrative hearings.

Title tangles caused by seizures of building and loan associations and claims of unconstitutional action by the government officials often are long-drawn-out, and unless the borrowers are able to obtain prompt relief, grievous suffering may result.

In *Zottarelli v. Pacific States,* District Court of Appeal, Calif., 1949, 211 P. 2d 23, 94 Cal. App. 2d 480, the California Court said, on page 25 of the Pacific and page 483 of Cal. App. 2d:

> ". . . Although started in 1939, the Hise Case was not finally determined until January, 1945, when the United States Supreme Court refused to take jurisdiction following the action of the California Supreme Court upholding the decision of the superior court to the effect that the seizure was justified. [The Hise case was an attack upon the seizure of the Pacific State Savings and Loan as unconstitutional, etc.] During the period of this litigation the successive Commissioners were not free to settle the assets of the company, which consisted of real estate. Title insurance companies would not issue policies . . ."

Plaintiffs, Shareholders' Protective Committee, desired to protect their Association against just such period of title tangles beyond even the powers of the courts to clear, and they, therefore, immediately brought this action in the U. S. District Court and created a forum into which, by deposits of the total amount due on the loans, the borrowers could pay off their loans in full and thereby obtain clear and marketable titles.

In September of 1947, after the remand from the U. S. Supreme Court refusing to dismiss any of the complaints, cross-claims, interpleaders, motions, etc., for failure to exhaust administrative remedies or otherwise, the District Court found, on R. 2358 (16):

> "That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconveyances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property, . . ."

Appellants appealed this order and the findings therein contained, including the finding, on R. 2354 (2):

> "That the Court has jurisdiction of the persons and subject matter involved, . . ."

to this Honorable Court of Appeals for the Ninth Circuit, Appeal No. 11751 (1947).

Appellants also, in November of 1947, took their Appeal No. 11867 from the last 4 of 50 intervention orders clearing titles to the homes of approximately 500 borrowers. Both appeals were dismissed in 1948.

The opinion of the Court of Appeals that no action can be brought for *any* relief prior to exhaustion of administrative remedies and final decision by the administrative agency as to the validity of the appointment of the conservator would doom the borrowers from every seized savings and loan association to a period of years in which no court could ever clear titles to their homes under any circumstances.

The interpleader jurisdiction exercised by the court below for the clearing of these titles was all that saved the Long Beach Association from the fate of Pacific States, a period of six years when no real estate titles could be cleared EVEN WITH COURT ACTION.

Contrast this with the Home Investment Company interpleader of $800,000.00. The Court action was filed May 27, the titles to the homes interplead in June, and the first order clearing such titles was made July 13, all in 1946, about six weeks after commencement of the action.

Dismissal if ordered will recloud the titles of the homes of the 8,000 borrowers cleared in 1948 by the mass interpleader into the registry of the District Court of in excess of $14,000,000.00 in notes, deeds of trust, government bonds, etc. And all this will be done merely to insure that the administrative hearings refused for 20 months by appellant Board shall take priority over this Court's proceedings.

The Court of Appeals' Opinion holds that neither depositors nor the borrowers (homeowners) can state any cause of action for *any* relief from the courts unless and until an administrative hearing has been held and con-

cluded. When administrative hearing was demanded Home Loan Bank Board Chairman Divers said:

> "Under the Regulations hearing . . . is held at request of Associations Board of Directors . . . request for such hearing is not now pending."

For one and one-half years, the administrative hearing was thus refused. Thereby hearing both before the administrative Board and in the courts is denied to depositors and borrowers. The right to a hearing is constitutional. The holding in the opinion, denying the right to interplead, under these circumstances is unconstitutional denial of due process.

XIII.

ADMINISTRATIVE HEARINGS USURP COURTS' POWER.

Order No. 2015 contains four specifications, every one of which was pending before the court below for decision, as a result of the action by the Court in January of 1948 and subsequently, AFTER THE EXHAUSTION OF ALL ADMINISTRATIVE REMEDIES by final order No. 388, the Board's conclusive and final administrative decision that the conservator should be removed and should account with the court.

The four grounds of Order No. 2015 are:

1. Failure to file monthly and annual reports. The Court below has found (and the finding is nowhere attacked by appellants in their briefs, nor does the Court of Appeals in its opinion hold the findings without substantial support in the evidence), that such reports can not be made by the Association until the removed con-

servator's accounting is decided by the Court below. [Finding No. 67, R. 8278-8279.] The Court further found that for the Association to make such reports would be an abandonment of its claims in the litigation. Such reports require, as an example, statements of indebtedness to the Federal Home Loan Bank. The Association denies, and the San Francisco Bank and the conservator claim, such indebtedness of in excess of $7,000,000.00. The same principle applies to everyone of the more than 50 items of such monthly reports.

2. Failure to furnish an affidavit as to the books of the Association. The Court found [Findings 68 to 71. R. 8279-8280] that such affidavit was given, and the record discloses a receipt for such affidavit from the appellants' Chief Examiner to the President of the Association, and was filed with the Court below.

3. Failure of the Association to pay premiums to Federal Savings and Loan Insurance Corporation. The Court found [Findings Nos. 48 and 49, R. 8266] that such premiums were paid into Court in interpleader, but the Association denied liability to pay premiums calculated on the $7,000,000.00 debt of conservator Ammann to the San Francisco Bank.

4. No. 4 is a revival by appellants of the 1946 charges withdrawn in January of 1948 by rescission of Order No. 5254 appointing the Conservator and submitted to the Court by Order No. 388, where they are still pending.

As to grounds Nos. 1 and 3, the Court of Appeals' opinion nullifies orders of the Court below, first as to the accounting, an order made on the express consent of the appellants by their order No. 388, and the appointment of a Special Master, their own former attorney Ronald

Walker, to hear the accounting proceedings. No. 3, the orders of deposit of the $36,487.25 insurance premiums, into the registry of the Court, were all then final from failure to appeal therefrom.

Yet, the Court of Appeals' opinion holds that these grounds submitted to the Court below by appellants themselves, as to No. 1, and by interpleader statutes, as to No. 3, are matters which the Home Loan Bank Board may require the Association to withdraw from the Court and submit to administrative proceedings.

XIV.

POWER OF DISTRICT COURT TO ALLOW AMENDMENTS.

The Court of Appeals' opinion condemns the District Court for allowing the action to remain pending after September 1947, and for permitting amendments after the Supreme Court remand which did not direct dismissal.

The statutory three-judge court (Justice Orr, C. C. A. 9; Judge Ling, Arizona; Judge Hall, S. D. Calif.) on September 9, 1946, unanimously held the Act of Congress unconstitutional. Dismissal of the action after this opinion would have been contradictory, to say the least. Dismissal by Judge Hall after the Supreme Court considered and refused to dismiss the six separate complaints, cross-claims, etc., would have been presumptuous, particularly in view of the Supreme Court's well-known ability to expressly order dismissal in its opinion and mandate when it so intends.

Refusal to give any receipts or accounting for $26,000,000.00 of seized cash, government bonds, and negotiable securities, is a matter which should not be decided on tech-

nicalities such as the statute of limitations, or failure to exhaust administrative remedies.

In considering refusal of an accounting under somewhat similar circumstances in:

> *Rogers v. Hill,* 289 U. S. 582, 77 L. Ed. 1385, U. S. Sup. Ct. (1933),

the U. S. Supreme Court said at page 587 of U. S.:

> ". . . The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits but the decree did not extend beyond mere reversal of the order from which the appeal was taken . . .
>
> ". . . But, assuming it included the opinion, the mandate would not prevent the District Court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce THE ACCOUNTING sought by his bills of complaint . . ." (Citing four U. S. Supreme Court authorities.) (Emphasis added.)

The allegations of the amended pleadings dealt at length with inadequacy, unavailability, and other defects of the administrative hearing. [R. 2991-2997, 3270-3276.]

Instead of answering the amended pleadings, appellant Home Loan Bank Board adopted its Resolution No. 388, which by its terms required a copy to be filed with the Court below, rescinding the order appointing the conservator and ordering an accounting to be made with the Court.

Appellants Home Loan Bank Board could then have renewed their motions to dismiss for failure to exhaust administrative remedies, and other dilatory pleas. Instead, they obtained extensions of time to answer, and asked "to

be excused from this hearing," when the Court was hearing the $14,000,000.00 interpleader to clear the titles of the homes of the 8,000 borrowers. They allowed the judgment of the District Court, removing the conservator and ordering the accounting, to become final from lack of appeal.

As we have elsewhere stated at greater length, exhaustion of administrative remedies goes not to jurisdiction, but to the question of when the court should act. If appellants wanted to hold an administrative hearing (1) on their own accounting; (2) on the removal of conservator Ammann; or (3) on any other matter, from November 10, 1947, to September, 1949, only their own refusal prevented them from so doing.

January 20, 1948, *before* the District Court entered its judgment removing conservator Ammann and ordering the accounting, with full knowledge that such judgment would be entered within a matter of hours, appellants Home Loan Bank Board refused the request of two Long Beach shareholders for an administrative hearing.

The transcript of the proceedings from which the judgment removing Ammann as conservator and ordering him to account resulted is at R. 10303-10334.

Appellant Home Loan Bank Board was represented by the then U. S. Attorney, now District Judge, Honorable James M. Carter, and its principal attorney William F. McKenna. Resolution No. 388 was presented to the Court. Their attorneys read to the court a telegram, signed by the then two Board members, William K. Divers and J. Alston Adams, and a letter addressed to the conservator Ammann, and signed by Divers, Chairman of the Board. Nowhere in the telegram, nor in any of the statements of

appellants' counsel to the court, is there any mention of administrative hearings. Appellants' own attorney Ronald Walker, was appointed Special Master. A $1,000,000.00 bond was filed with the Court by the officers of the Association [R. 3553-3556], at the request of Judge Carter, then attorney for appellants.

The election under the direction of the Court was requested by appellants, and granted.

Judge Carter, then attorney for appellants, asked the Court for an order,

> ". . . to the effect that the acts of Ammann during his occupancy be considered legal acts of a Conservator duly appointed . . ." [R. 10332-10333.]

If appellants desired an administrative hearing on the validity of Ammann's appointment, or the legality of his acts as conservator, could they submit that issue to the Court for decision by their own attorneys' request for such an order, and yet the court be without jurisdiction to grant ANY relief?

On March 10, 1948, the Court ordered the Association to file amended pleadings after the deposit of $14,000,000.00 in the registry of the Court. On May 28, 1948, this was done. By Order No. 388, final administrative determination had been made. Order No. 388 had been filed with the Court and the Court had made its final judgment on such order. The $14,000,000.00 had been deposited in the registry of the Court, and both the Court order requiring the deposit [March 13, 1948, R. 8399-8525] and the order quieting the Association's title to $8,500,000.00 of trust deeds [March 26, 1948, R. 8526-8537] were final. No appeal had been taken from any of the three judgments (1) January 23, 1948; (2) March 13, 1948; (3) March

26, 1948, and the time for appeal from all three had expired.

Administrative hearing requested in January of 1948 by two of the Association's shareholders, had been expressly refused. Yet the Court of Appeals' opinion states that none of the pleadings could state a claim upon which *any* relief could be granted (p. 51); nor could they be amended so to do (p. 40).

Enforcement of final judgments of a Federal Court does not depend upon matters of pleadings, passed upon by the Court in rendering such judgment.

RELIANCE OF APPELLEES UPON SUPREME COURT OPINION AND REMAND.

Appellees had a right to, and did, rely upon the fact that the attack made by appellants in the United States Supreme Court, upon the pleadings of all parties for failure to exhaust administrative remedies, had been unsuccessful, and that the Supreme Court had refused dismissal and had remanded the case to the District Court for further proceedings in accordance with law.

Upon that reliance upon the Supreme Court remand and opinion, appellees have amended their pleadings on successive occasions and plead to the District Court, in whose registry the assets were on deposit, their various claims for relief, particularly their claim for an accounting for the seized $26,000,000.00. Appellees have relied upon the final judgment (agreed by all parties to this appeal to be final) of that court removing the Conservator and ordering such accounting.

If now, all these proceedings be swept away and dismissed, the statute of limitations will become available for an absolute defense to appellants.

This Court expressed real concern on the motion of the San Francisco Bank, heard on the 24th of March, 1952, that the litigation be decided ON ITS MERITS and not on any technicality, and this Court vacated a preliminary injunction WITHOUT ANY NOTICE to certain of the parties which had obtained that injunction, so as to permit San Francisco Bank to file an action in order to prevent the technical defense of the statute of limitations possibly obstructing the recovery of $6,300,000.00.

But if the complaints of all appellees in the District Court, pending there for nearly six years and bearing the approval of the United States Supreme Court which refused to dismiss them in 1947, be now swept aside and dismissed, appellant Ammann will have escaped all liability to account (not for $6,300,000.00) but for $26,000,000.00 of cash, government bonds, and negotiable securities seized without even a receipt to evidence how much was taken, or from whom.

The Home Investment Company received orders of the District Court in 1946 clearing the titles to 174 homes. The Supreme Court refused to dismiss this interpleader or to vacate these orders, and for six years the purchasers of the property have dealt with the titles thus cleared in reliance upon that Supreme Court decision. Dismissal now, for failure to exhaust administrative remedies in 1946, would of necessity require the return of the interplead $800,000.00 to the Home Investment Company and the reclouding of the titles to the 174 homes.

Why the failure of a lender to exhaust an administrative remedy should preclude the borrower from quieting title to his home is difficult to perceive. Even more difficult to understand is how the administrative remedy UNAVAIL-

ABLE TO THE BORROWER could clear the title to thousands of homes. Titles had been entangled by the conservator's conveyances of the deeds of trust to a Federal Home Loan Bank, the validity of whose existence was then questioned in pending litigation. The Court of Appeals has refused to dismiss the Los Angeles Bank case which therefore will probably remain pending for several additional years, and the titles to the homes of 8,000 borrowers remain clouded for that time.

XV.
ACCOUNTING.

By final judgment of the Court below (January 23, 1948), removed conservator Ammann was ordered to render to that Court and to the Shareholders' Protective Committee, whose $26,000,000.00 in assets he had seized without receipts, a full and complete accounting. All parties to this appeal agree that this is a final judgment. (Appellants' Opening Brief, pp. 34-35.)

This accounting was within the express prayer of both ORIGINAL and AMENDED pleadings of the Shareholders' Protective Committee and of the Association. [Appeal No. 12511, R. 23, 354-355, 3089-3090, 3335.]

In *Rogers v. Hill, supra,* the Supreme Court said:

> ". . . the mandate would not prevent the District Court . . . from allowing plaintiff, . . . to file additional pleadings, vary or expand the issues and take other proceedings to enforce the ACCOUNTING sought by his bills of complaint." (Emphasis added.)

Courts of equity are alert to compel trustees to account with the beneficiaries for the dealings with the assets and property of others.

Appellant, Board, by its Order No. 388, expressly directed,

> ". . . that the conservator . . . is hereby . . . directed . . . to make a full and complete accounting to said shareholders . . . with the District Court of the United States in and for the Southern District of California . . . that a certified copy of this resolution be forthwith delivered to the above named court."

Administrative action, on the question of accounting, was thereby final, conclusive and exhausted.

The first accounting has been rejected by the Court, and decision of the objections to the second attempt to account await the outcome of this appeal.

Order No. 388 was filed in January, 1948, with the Court by appellant Board as its answer to the amended pleadings filed by Mallonee in December, 1947, and by the Association in January, 1948. It constituted a confession of judgment for an accounting. No appeal was ever taken from it.

The validity of Order No. 388 to require such accounting was one of the issues before the Court on January 23, 1948, decided by the Court when it made its final judgment ordering such accounting.

The effect of the Court of Appeals' opinion is that no shareholders' committee can ever state any cause of action for an accounting against a conservator who seizes their uncounted cash, government bonds and negotiable securities aggregating $26,000,000.00, and refuses to re-

ceipt for them, and that both administrative agency and court orders requiring such accounting are unenforceable.

Finality of the judgment based on express final order of the administrative agency required by its terms to be filed with the Court is swept aside because of an alleged defect in pleadings; pleadings which were passed upon by the Supreme Court and by the District Court when rendering the judgment.

The Court of Appeals' opinion states, at page 55, that,

> ". . . Personal corruption and breach of trust for personal gain are not charged . . . in the instant case."

Counsel respectfully disagrees. The accounting objections demand justification for approximately $160,000.00 paid or charged for "conservator's expenses" and "supervisory examinations," without substantiation or itemization whatsoever.

Payment of any comparable sum by any trustee to himself for his own services, unexplained, unauthorized, and unapproved would result in summary suspension and removal of that trustee. If explanation or justification can be made for the payment of approximately $160,000.00 by the trustee, from the trust assets to himself, for his own services, the four (4) years which have elapsed would seem ample time for such explanation to be forthcoming.

If dismissal of the accounting proceedings be ordered the statute of limitations will probably prevent the Share-

holders' Protective Committee ever discovering what the $160,000.00 was paid for, or to whom it was paid.

Another accounting objection demands surcharge for $5,000,000.00 of illegal loans, made upon security falsely represented to be first liens, but actually second or junior liens. The objections charge F.H.A. and V.A. insurance of said loans is void because of falsifications by the removed conservator in applying for insurance upon such loans.

These are but two of the many charges of "personal corruption and breach of trust . . . for personal gain . . ." relief for which is sought before the Court below.

Conclusion.

For the foregoing reasons, it is respectfully submitted that Counsel should be afforded the opportunity to reargue this matter before either the full court or the same panel. If rehearing be not granted, Counsel respectfully urges the Court to make its order staying the issuance of mandate pending preparation and presentation to the Supreme Court of our Petitions for Certiorari.

Respectfully submitted,

CHARLES K. CHAPMAN,

Attorney for Appellee, Long Beach Federal Savings and Loan Association.

Certificate of Counsel.

CHARLES K. CHAPMAN certifies and says:

That he is the Attorney for one of the appellees in this cause, to-wit, Appellee Long Beach Federal Savings and Loan Association; that he makes this certificate in compliance with Rule 25 of the Rules of this Court; that in his judgment, the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

CHARLES K. CHAPMAN.